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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 In re LENOVO ADWARE LITIGATION)	Case No. 5:15-md-02624-RMW
_____)	
17 This Document Relates To:)	PLAINTIFFS' JOINT RESPONSE IN
18)	SUPPORT OF MOTION FOR THE
19 ALL ACTIONS.)	APPOINTMENT OF INTERIM CO-LEAD
_____)	CLASS COUNSEL

20 Date: July 17, 2015
Time: 9:00 a.m.
21 Courtroom: 6 - 4th Floor
Judge: Hon. Ronald M. Whyte
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1 **I. INTRODUCTION**

2 The case underlying the competing motions for appointment of interim class counsel is a
3 massive consumer class action that lies at the intersection of highly advanced computer and internet
4 technologies and cutting edge consumer privacy jurisprudence. The putative class is nationwide and
5 exceptionally large. Four sets of counsel seek the Court’s appointment under Rule 23(g) of the
6 Federal Rules of Civil Procedure.

7 Of the four competing motions, one is brought by two law firms that have successfully
8 resolved more of the country’s cutting edge privacy and technology related class actions than any
9 others. Those firms, Robbins Geller Rudman & Dowd LLP (“Robbins Geller”) and Edelson PC
10 (“Edelson”) (collectively, the “Firms”), have not only helped shape the law in these emerging
11 practice areas, they have achieved significant monetary compensation for aggrieved consumers, a
12 notable distinction from other firms that seek appointment here. The lawyers in the Robbins Geller
13 and Edelson team not only have the most success representing consumers in privacy and technology
14 cases, but have litigated – through class, merits, and expert discovery, through class certification, to
15 settlement, and to trial – some of the largest and most complex class actions in history, including
16 groundbreaking class actions involving novel privacy and technology issues.

17 The competing motions also demonstrate that Robbins Geller and Edelson have conducted
18 the most thorough pre-filing and ongoing investigation – the results of which appeared for the first
19 time in the *Pick* and *Hunter* complaints filed by Robbins Geller and Edelson, respectively. Indeed –
20 and confirming Robbins Geller and Edelson’s status as leaders in the field – these new allegations
21 led one of the Competing Firms (Cotchett, Pitre & McCarthy LLP (“Cotchett”)) to copy no fewer
22 than *nine* paragraphs from the *Hunter* complaint.

23 And, the Firms have demonstrated an efficient and inclusive approach to the prosecution of
24 these cases. With respect to efficiency, Robbins Geller and Edelson are the only firms seeking lead
25 that attempted to avoid duplicative procedural work prior to consolidation, and instead secured a
26 mutual exchange of relevant information with defendants, agreements on various discovery issues,
27 and an agreement to proceed with an early mediation. They also attempted to include other firms
28

1 seeking lead appointments in that process – offering to share the information obtained and the results
2 of their own investigations, and extending invitations to participate as equals in any early mediation.

3 For the reasons more fully set forth in their opening motion and herein, given their
4 unmatched experience in privacy and technology related lawsuits, their unparalleled record of
5 results, and their demonstrated commitment to this case, Robbins Geller and Edelson respectfully
6 request the Court’s appointment as Interim Co-Lead Class Counsel.

7 **II. BRIEF FACTUAL AND PROCEDURAL BACKGROUND**

8 As previously detailed, the Consolidated Actions arose from a 2014 partnership between
9 defendants to pre-install Superfish’s Visual Discovery software (the “Software”) on millions of
10 Lenovo’s consumer-oriented computers. Dkt. No. 6-2, Ex. 3, ¶15 (*Hunter* Complaint). That
11 partnership, and the installation of Superfish’s software, resulted in defendants’ interception and
12 monitoring of millions of consumers’ online activities, as well as defendants’ injection of
13 advertisements into consumers’ Internet browsing sessions. *Id.*, ¶15.

14 Following the public disclosure of the defendants’ use of the Software and beginning on
15 February 20, 2015, 28 putative class actions (collectively, “Actions”) were filed in 9 District Courts
16 throughout the country. Within five days of the first complaint being filed, Robbins Geller filed a
17 motion before the Judicial Panel on Multidistrict Litigation (“JPML”) to consolidate and transfer the
18 Actions for coordinated pretrial proceedings. After full briefing on the motion, on June 8, 2015, the
19 JPML consolidated and transferred the Actions to this Court. *Sterling* Dkt. No. 38.

20 On June 18, 2015, all plaintiffs stipulated to a schedule regarding the filing and briefing on
21 any motions for the appointment of interim class counsel in the Consolidated Actions. *See Sterling*
22 Dkt. Nos. 39, 40. Following that schedule, on June 23, 2015, plaintiffs’ counsel in seven of the
23 Consolidated Actions moved to be appointed interim class counsel as follows:

- 24 1. **The *Pick* and *Hunter* Actions:** Robbins Geller and Edelson.
- 25 2. **The *Sterling*, *JGX* and *Estrella* Actions:** Pritzker Levine LLP (“Pritzker
26 Levine”); Cotchett; and Girard Gibbs LLP (“Girard Gibbs”).
- 27 3. **The *Wood* Action:** Block & Leviton, LLP (“Block & Leviton”) and Van
28 Laningham Duncan PLLC (“Van Laningham”).

1 4. **The *Babbitt* Action:** Joseph Saveri Law Firm, Inc. (“Saveri firm”).¹

2 Per the Court’s June 24, 2015 Initial Case Management Order, the foregoing plaintiffs’
3 counsel have met and conferred regarding, *inter alia*, the procedure for appointment interim class
4 counsel in the Consolidated Actions (as previously stipulated) and the responsibilities of interim
5 class counsel once appointed. *See Sterling* Dkt. No. 41.

6 **III. ARGUMENT**

7 “Rule 23(g)(3) grants the Court authority to appoint pre-certification ‘interim’ class
8 counsel . . . ‘if necessary to protect the interests of the putative class,’” prior to certification. *White*
9 *v. Experian Info. Solutions*, 993 F. Supp. 2d 1154, 1169 (C.D. Cal. 2014), *amended*, 2014 U.S. Dist.
10 LEXIS 61433 (C.D. Cal. May 1, 2014) (citations omitted). In selecting interim class counsel, Rule
11 23(g)(2) requires the appointment of counsel “‘best able to represent the interests of the class.’” *Id.*
12 at 1169-70. Thus, courts typically consider:

- 13 1. the work counsel has done in identifying or investigating potential claims in
14 the action;
- 15 2. counsel’s experience in handling class actions, other complex litigation, and
16 the types of claims asserted in the action;
- 17 3. counsel’s knowledge of the applicable law; and
- 18 4. the resources that counsel will commit to representing the class.

19 Fed. R. Civ. P. 23(g)(1)(A); *see also In re Sensa Weight Loss Litig.*, No. 11-CV-1650-YGR, 2012
20 U.S. Dist. LEXIS 28178, at *4-*5 (N.D. Cal. Mar. 2, 2012).

21 As explained in *Pick and Hunter’s* opening motion, Robbins Geller and Edelson are the best
22 suited of all proposed interim class counsel to represent the Class. Robbins Geller and Edelson have
23 the most relevant experience and have obtained superior results in similar actions. As a result,
24 Robbins Geller and Edelson were able to perform the most detailed and intensive pre-suit
25 investigations of any of the firms – as reflected in their complaints, which provide far greater detail
26 than the other 26 complaints. Accordingly, and as set out in greater detail below, Robbins Geller
and Edelson should be appointed Interim Co-Lead Class Counsel.

27 ¹ The Pritzker Levine; Cotchett; Girard Gibbs; Block & Leviton; Van Laningham; and Saveri firm
28 are collectively referred to herein as the “Competing Firms” and individually, “Competing Firm.”

IV. THE COMPETING FIRMS' MOTIONS DEMONSTRATE THAT ROBBINS GELLER AND EDELSON ARE THE MOST EXPERIENCED AND KNOWLEDGEABLE REGARDING CONSUMER TECHNOLOGY AND PRIVACY CLASS ACTIONS, SUCH AS THE CONSOLIDATED ACTIONS

While all of the competing motions for interim class counsel appointment are impressive, it is clear that Robbins Geller and Edelson offer an unrivalled combination of resources and experience in privacy and technology class actions such as this. And while class-action experience is key to any leadership analysis, in high-profile multidistrict litigation like this, it is common for all firms involved to be generally successful. Thus, where multiple “firms proposed as co-lead counsel are . . . well qualified [generally],” courts regularly appoint as interim lead the firm or firms that “stand out from the rest with regard to qualifications particularly applicable to [the] case.” *Four in One Co., Inc. v. SK Foods, L.P.*, No. 2:08-cv-03017-MCE-EFB, 2009 WL 747160, at *3 (E.D. Cal. Mar. 20, 2009); *see also In re Wachovia Corp. Erisa Litig.*, No. 08 Civ. 5320 (NRB), 2008 WL 5459852, at *1 (S.D.N.Y. Dec. 29, 2008) (noting that “[w]hile [one proposed lead firm was] certainly an experienced firm in the securities class action arena, they did not present as extensive a history in the ERISA context as [the firm appointed lead]”).

Here, while several of the Competing Firms are experienced in plaintiffs’ class action work generally, none have the significant experience in privacy and technology class actions offered by Robbins Geller and Edelson, and none have obtained the exceptional results such as those obtained by Robbins Geller and Edelson.

A. Robbins Geller and Edelson Have Substantial (and Superior) Experience Litigating Consumer Privacy and Technology Class Actions of Similar Size and Scope

As detailed in their moving papers, Robbins Geller and Edelson have been at the forefront of consumer privacy and technology class actions for years. Robbins Geller, for instance, has been lead counsel in two of the largest privacy class actions to date, *Kehoe v. Fid. Fed. Bank & Trust*, 421 F.3d 1209 (11th Cir. 2005),² and *In re Trans Union Corp. Privacy Litig.*, MDL No. 1350 (N.D. Ill.),

² *Kehoe* involved a bank’s violation of the federal Driver’s Privacy Protection Act (“DPPA”) by purchasing the personal driver’s licence information of over 500,000 Florida residents. Following summary judgment in favor of the bank on the ground that the DPPA required proof of actual damages in order to be entitled to statutory damages, the Eleventh Circuit reversed in a seminal

1 which settled for \$50 million and \$75 million, respectively. Robbins Geller was also co-lead counsel
 2 in *In re Sony Gaming Networks & Consumer Data Sec. Breach Litig.*, MDL No. 2258 (S.D. Cal.),
 3 which involved 65 consolidated class actions, eventually resulted in a class settlement valued at over
 4 \$15 million.

5 Edelson, for its part, is recognized as a “pioneer[] in the electronic privacy class action field,
 6 having litigated some of the largest consumer class actions in the country on this issue.” *In re*
 7 *Facebook Privacy Litig.*, No. 10-cv-2389, Dkt. No. 69, at 5 (N.D. Cal. Dec. 10, 2010). Edelson has
 8 been involved in a variety of groundbreaking data privacy and security class actions, having obtained
 9 some of the largest settlements and seminal decisions in the field. *See, e.g., Satterfield v. Simon &*
 10 *Schuster, Inc.*, 569 F.3d 946 (9th Cir. 2009) (holding that Telephone Consumer Protection Act
 11 applies to text messages sent to cellular telephones, and directly leading to Edelson recovering well
 12 over \$100 million for consumers through dozens of settlements in similar cases); *Resnick v. AvMed,*
 13 *Inc.*, 693 F.3d 1317 (11th Cir. 2012) (holding that data breach victim stated cause of action for unjust
 14 enrichment arising from insurer’s failure to deliver privacy protections, independent of any incidence
 15 of actual identity theft). Particularly relevant here, Edelson was class counsel in *Harris v. comScore,*
 16 No. 11-cv-5807 (N.D. Ill.), a class action where – much like here – a leading online data analytics
 17 company allegedly installed spyware on consumers’ computers and accessed and intercepted
 18 computer files and online communications without consent. After certifying a class of approximately
 19 10 million consumers (believed to be the largest damages class adversarially certified in any privacy
 20 case to date), Edelson negotiated a \$14 million, non-reversionary settlement that paid claiming class
 21 members nearly \$600 each.

22 Without question, Robbins Geller and Edelson “stand out from the rest with regard to
 23 qualifications particularly applicable to this case,” and are more than fit to act as interim co-lead
 24 class counsel in this case. *Four in One Co.*, 2009 WL 747160, at *3.

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 27 privacy law decision, concluding that “[a] plaintiff need not prove actual damages to recover
 28 liquidated damages for a violation of the DPPA.” *Id.* at 1217. Robbins Geller settled the *Kehoe*
 action for \$50 million after full briefing on class certification.

B. The Competing Firms' Motions Demonstrate that While They Have Experience in Class Actions Generally, They Lack Comparable Experience in Privacy and Technology Class Actions

By contrast, while the Competing Firms have track records of bringing class actions, generally, none have the demonstrated experience in consumer privacy cases necessary to most effectively prosecute this action on behalf of the Class.

For instance, while Block & Leviton; Pritzker Levine; Cotchett; and Saveri firm all have experience in class actions generally, none have identified any relevant or analogous consumer privacy or technology class actions that they have prosecuted.³ When compared to Robbins Geller and Edelson, then, those firms fall short. *See Crocker v. KV Pharm. Co.*, No. 4:09-CV-198 (CEJ), 2009 WL 1297684, at *2 (E.D. Mo. May 7, 2009) (finding firm's lack of experience in the particular type of suit at issue, when contrasted with competing firm, dispositive in lead counsel analysis).

Girard Gibbs does describe some experience in plaintiffs' privacy class actions; however, the results it obtained contrast sharply with those achieved by Robbins Geller and Edelson. While Robbins Geller and Edelson have collectively recovered hundreds of millions in cash payments for consumers in privacy class actions, Girard Gibbs's privacy cases have resulted in paltry recoveries, at best. For example, in support of its leadership motion, the two HMO data breach cases cited by Girard Gibbs resulted only in class members receiving credit monitoring and being eligible for a class distribution *only if they were able to show identity theft damages*. *Whitaker v. Health Net of California, Inc.*, No. 11-cv-910 (E.D. Cal.); *Shurtleff v. Health Net of California*, No. 34-2012-00121600-CU-CL (Sac. Cnty. Sup. Ct.). By contrast, Robbins Geller has recovered cash for victims of privacy breaches, even without a requisite showing of identity theft. *See In re Sony Gaming Networks*, MDL No. 2258; *Trans Union Privacy*, MDL No. 1350 (N.D. Ill.); *Kehoe*, No. 03-80593-CIV-HURLEY/LYNCH (S.D. Fla.). Likewise, Edelson has, on two separate occasions, negotiated data breach settlements where class members have been entitled to cash payments regardless of whether they suffered any identity theft, on the theory that they did not receive the full value of the services they paid for (*i.e.*, private and secure services). *See Resnick v. AvMed, Inc.*, No. 10-cv-

³ The Saveri firm, for its part, is a very successful *antitrust* firm, as highlighted by their resumes and cited successes. But this is not an antitrust case.

24513 (S.D. Fla.) (cash payment of up to \$30 per claiming class member without showing of identity theft); *In re LinkedIn User Privacy Litig.*, No. 12-cv-3088 (N.D. Cal.) (providing for approximately \$15 per claiming class member without showing of identity theft). Thus, while Girard Gibbs may have knowledge of the applicable fields of law, its results obtained fall far short of the standard set by Robbins Geller and Edelson. *See In re Quintus Sec. Litig.*, 148 F. Supp. 2d 967, 981 (N.D. Cal. 2001) (noting that the “acid test for any plaintiff firm is its ability to produce a superior recovery”).

Finally, with due respect, Van Laningham (co-counsel with Block & Leviton) not only lacks experience in the privacy and technology class action field, it does not appear to have experience prosecuting class actions at all, much less trying them to a jury.⁴ Absent such experience, the Van Laningham firm cannot be the best option for representing the proposed class. *See Galicki v. New Jersey*, No. 14-cv-169 (JLL), 2014 WL 4979499, at *2 (D.N.J. Oct. 6, 2014) (denying firm’s motion to be appointed as lead where “the Court note[d] that [it was] highly experienced – and successful – in representing plaintiffs in a variety of personal injury matters,” but “there [was] no indication from the papers submitted that said law firm ha[d] any experience in instituting and/or litigating class actions or mass tort claims”).

V. THE SUBSTANTIVE WORK PERFORMED TO DATE CONFIRMS THAT ROBBINS GELLER AND EDELSON OFFER THE ONLY UNIQUE CAPABILITIES TO ENHANCE THE STRENGTH OF THE CLASS’S CLAIMS

As a result of their substantial experience in privacy and technology class actions, Robbins Geller and Edelson already demonstrated the value they add to this litigation. That is, through their detailed investigative efforts to date, along with their promotion of efficiencies for all parties and the Court, Robbins Geller and Edelson have shown that their continued leadership of the Consolidated Actions will deliver superior results. *See In re Mun. Derivatives Antitrust Litig.*, 252 F.R.D. 184, 186 (S.D.N.Y. 2008) (awarding lead counsel position to firms that “expended substantially more

⁴ As noted in their opening motion, Robbins Geller attorneys tried to verdict a multi-billion dollar securities fraud class action in the Northern District of Illinois, *Jaffe v. Household Int’l, Inc.*, No. 02-C-5893 (N.D. Ill.). Recently, the Seventh Circuit remanded on very narrow grounds, and Robbins Geller is currently gearing up for a second, albeit more limited trial.

1 effort and resources” to their investigation “and obtained more substantial and more valuable and
2 reliable information”).

3 **A. The *Hunter* and *Pick* Complaints Demonstrate Robbins Geller and**
4 **Edelson’s Expertise in Privacy Class Actions**

5 Rather than simply relying on news reports and press releases, the *Pick* and *Hunter*
6 complaints both include detailed allegations demonstrating not only the depth of their attorneys’ pre-
7 suit investigations, but also the extent of their understanding of the key factual and legal issues
8 involved. While other firms were content to recite merely “what happened,” Robbins Geller and
9 Edelson went far beyond that, discussing the critical questions of “why” and “how” the privacy and
10 security breach happened. For instance, *Pick*’s counsel at Robbins Geller, upon discovery of
11 Lenovo’s operation of the Software, provided detailed and thorough allegations in their complaint
12 concerning the means by which the Software operated and infected computers. Dkt. No. 6-2, Ex. 4,
13 ¶¶15-29 (*Pick* Complaint). Whereas other firms were content with rote recitation of news articles
14 and press releases, *Pick*’s investigation started at the foundation of internet security, and then
15 gradually worked up to the explanation of how the Software undermined that security.

16 Likewise, *Hunter*’s counsel at Edelson performed an extensive technical analysis of the
17 Software at issue, allowing for the allegation of facts going above and beyond those included in
18 media reports. For instance, by performing a network protocol analysis of the web traffic to and from
19 a Lenovo laptop infected with the Software, Edelson revealed that the Software utilized third-party
20 Komodia’s Redirector application to intercept communications through its so-called transparent
21 “local proxy” feature. Dkt. No. 6-2, Ex. 3, ¶27 (*Hunter* Complaint). Moreover, *Hunter*’s
22 investigation showed that the Software was designed to leave behind the Superfish Root Certificate,
23 even after the Software was uninstalled. *Id.*, ¶24; *see also* Gregg Keizer, *More lawyers swoop down*
24 *on Lenovo, Superfish with class-action lawsuits in hand*, Computerworld (Feb. 24, 2015) (available
25 at [http://www.computerworld.com/article/2888453/more-lawyers-swoop-down-on-lenovo-superfish-](http://www.computerworld.com/article/2888453/more-lawyers-swoop-down-on-lenovo-superfish-with-class-action-lawsuits-in-hand.html)
26 *with-class-action-lawsuits-in-hand.html*) (contrasting *Hunter* and *Sterling* complaints, and noting
27 that “[o]f the two . . . , *Hunter*’s was the more interesting as it relied not only on press reports about
28

1 Superfish's vulnerability and Lenovo's actions both before and after last week's explosion of
2 information, but also dug a bit deeper and offered insights into the adware's operation").

3 Taken as a whole, Robbins Geller and Edelson's extensive privacy class action experience,
4 along with their intensive investigations into the facts underlying their clients' complaints,
5 demonstrate that they can and will continue to add exceptional value to this litigation.⁵

6 **B. By Contrast, the Complaints Filed by the Competing Firms Show that**
7 **They Simply Chased the News, and, to the Extent They Performed**
8 **Any Independent Pre-Suit Investigation, Those Investigations Added**
9 **No Value Beyond Mere Confirmation of News Reports**

10 By contrast, the complaints filed by the Competing Firms – *Sterling*, *JGX*, and *Estrella* by
11 Pritzker Levine, Cotchett, and Girard Gibbs, respectively; *Wood* by Leviton & Block and Van
12 Laningham; and *Babbitt* by the Saveri firm – simply parrot news reports and press releases regarding
13 Lenovo's conduct, at best; and at worst, they actually copy (at times, word-for-word) the allegations
14 in the *Hunter* complaint filed by Edelson.

15 **1. The *Sterling*, *JGX* and *Estrella* Complaints Largely Rehash**
16 **News Reports and Press Releases, While Copying the *Hunter***
17 **Complaint Where Additional Detail Is Needed**

18 The *Sterling* and *Estrella* complaints, like many of the 28 complaints filed against
19 defendants, draw their operative facts from news reports and Lenovo press releases, with their
20 investigations seemingly functioning only to confirm media reports. *See* Dkt. No. 5 at 4-5. The *JGX*
21 complaint, filed by the Cotchett firm, is largely rooted in the same quotes from news reports and

22 ⁵ Robbins Geller and Edelson's team will include, *inter alia*, Robbins Geller's Patrick Coughlin,
23 one of the most experienced and successful litigators in the country, and certainly in the state of
24 California. Coughlin developed his trial skills as an Assistant United States Attorney in the District
25 of Columbia and the Southern District of California, handling dozens of felony cases and countless
26 misdemeanors, ranging from white-collar fraud to serious armed felonies. *See, e.g., United States v.*
27 *Brown*, No. 850342 (D.D.C.) (a seven month long RICO trial, one of the largest RICO cases ever
28 brought by the government); *United States v. Boeckman*, No. 93-56325, 1994 U.S. App. LEXIS
23282 (9th Cir. Aug. 25, 1994) (one of the first federal murder-for-hire prosecutions). Upon moving
into private practice, Coughlin has enjoyed continuous and substantial success. Coughlin served as
lead counsel in the country's biggest securities case, Enron, where he recovered \$7.3 billion, and as
plaintiffs' counsel in the Joe Camel cigarette ad case, where he helped secure a \$12.5 billion
judgment for the cities and counties of California. *See, e.g., In re Enron Corp. Sec. Litig.*, No. H-01-
3624 (S.D. Tex.). Coughlin has also litigated to trial countless other cases, and recently resolved the
largest civil antitrust lawsuit ever, recovering billions for class members. *See In re Payment Card*
Interchange Fee & Merchant Discount Antitrust Litig., No. 05-MD-1720 (E.D.N.Y.). No other
movant can match this level of experience and guarantee the same quality of advocacy on behalf of
the putative class.

press releases, but goes a step further and copies (verbatim in some places, and nearly so in others) no fewer than *nine paragraphs* from the *Hunter* complaint, which was prepared and filed by Edelson two weeks prior.⁶ Likewise, the *Sterling* complaint has, at most, two paragraphs that attempted to show an understanding of the underlying facts that were not gleaned directly from the (commonly cited) articles published the day that the Software was widely revealed. *Sterling* Dkt. No. 1, ¶¶27-28 (*Sterling* Complaint). Otherwise, the complaint merely consolidated the news.

⁶ For instance, despite its assertions that it “met with industry consultants” and performed a detailed investigation, the Cotchett firm’s JGX complaint cribs *Hunter*’s characterization of “electronic storage” under the ECPA, noting that it “includes communications in intermediate storage that have not yet been delivered to their intended recipient.” *JGX* Dkt. No. 1, ¶ 66 (*JGX* Complaint); Dkt. No. 6-2, Ex. 3, ¶68 (*Hunter* Complaint). This unattributed copying continues in the ensuing paragraphs. *Compare*, for example:

- Defendants accessed facilities through which electronic communication services are provided via the Superfish Software. Specifically, Plaintiff’s and the Class’ computers provide electronic communications services that include operating as printer servers and wireless networking providers (*e.g.*, with Bluetooth or Wi-Fi), among others. *JGX* Dkt. No. 1, ¶68 (*JGX* Complaint).

with

- Defendants accessed facilities through which electronic communications services are provided through their Superfish Surveillance Software. Specifically, Plaintiff’s and the Class’s computers provide electronic communications services that include operating as printer servers and wireless networking providers (*e.g.*, with Bluetooth or WiFi), amongst others. Dkt. No. 6-2, Ex. 3, ¶71(*Hunter* Complaint);

and

- Modern web applications communicate in near real time over the Internet, meaning that when Plaintiff and the Class access such web applications by visiting webpages, their Internet browsers act as portals to facilities that provide electronic communications services, such as electronic bulletin boards, electronic mail servers, and computer server centers. *JGX* Dkt. No. 1, ¶69 (*JGX* Complaint).

with

- Modern web applications communicate in near real-time over the internet, meaning that when Plaintiff and the Class access such web applications by visiting web pages, their internet browsers act as portals to the facilities that provide electronic communications services, such as electronic bulletin boards, electronic mail servers, and computer server centers. Dkt. No. 6-2, Ex. 3, ¶72 (*Hunter* Complaint).

Compare also *JGX* Dkt. No. 1, ¶¶66, 70-75 (*JGX* Complaint) *with* Dkt. No. 6-2, Ex. 3, ¶¶ 68, 73-78 (*Hunter* Complaint).

Thus, while the *Sterling* and *Estrella* plaintiffs characterize their complaints as reflecting the results of their independent investigations, there is, as discussed above, little evidence to support that characterization. And while they claim that the *JGX* complaint was the result of “me[eting] with industry consultants about the Superfish program’s underlying technology,” and “analyz[ing] the results of virus scan programs like the McAfee PUP detection and ODS logs on affected computers,” in reality, the *JGX* complaint is “the result of” a cut-and-paste of Edelson’s work-product. Dkt. No. 5 at 4. Indeed, that complaint – in light of its copying of the *Hunter* complaint – reflects Edelson’s investigation more than any investigation conducted by Cotchett or any of the other Competing Firms.

2. The Wood and Babbitt Complaints

The *Wood* and *Babbitt* complaints – filed approximately two weeks, and two months, respectively, after the first complaint in the Consolidated Actions – much like the *Sterling* and *Estrella* complaints, rely wholeheartedly on news reports and Lenovo’s press releases. *See Wood* Dkt. No. 1 (*Wood* Complaint); *Babbitt* Dkt. No. 1 (*Babbitt* Complaint). The complaints do not appear to include *any* allegations derived from an independent pre-suit investigation, nor do the *Babbitt* or *Wood* plaintiffs’ motion to appoint interim class counsel claim that any such investigation took place. *See* Dkt. Nos. 3, 7.

C. The Work Performed to Date Shows that Robbins Geller and Edelson Have a Superior Understanding of the Factual and Legal Issues, Allowing Them to Proceed Most Efficiently, Especially Relative to the Competing Firms

As explained in their opening motion, since the filing of their complaints, Robbins Geller and Edelson have continued to work diligently to advance the interests of the Class and to promote efficiencies in the litigation where possible. These efforts have included, *inter alia*, early informational exchanges with defendants, offering to share with the Competing Firms the substance of their own investigations and their discussions with defendants, securing defendants’ agreement to proceed with an early mediation, consulting with leading industry groups and experts, such as the Electronic Frontier Foundation, and efforts to coordinate the (previously distinct) actions to avoid

1 duplication. *See* Dkt. No. 6 at 5-8. By contrast, the Competing Firms’ efforts have largely been
 2 inefficient, ineffectual, or purely political.

3 For instance, counsel for the *Sterling*, *JGX* and *Estrella* plaintiffs tout the fact that their
 4 counsel “took the lead in drafting a joint opposition to the motion filed before the JPML to transfer
 5 the litigation to the Eastern District of North Carolina,” in addition to moving to relate subsequently
 6 filed actions to *Sterling*, and “conferr[ing] with defense counsel and other plaintiffs’ counsel.” Dkt.
 7 No. 5 at 5. What they fail to mention, however, is that they:

- 8 1. Refused to stipulate to a stay of the Consolidated Actions pending the Panel’s
 9 decision on consolidation and transfer (a stay that was ultimately granted,
 10 over the *Sterling* plaintiffs’ objection (*see Sterling* Dkt. No. 37)). That,
 11 despite purportedly seeking to avoid duplication of effort or the need for
 judicial intervention, (*id.*) and Robbins Geller’s and Edelson’s requests that
 they do so in order to secure defendants’ agreement to an early production of
 certain relevant information;
- 12 2. Refused to engage in any preliminary discussions regarding early resolution,
 13 let alone an early mediation, despite defendants’ desire to engage in early
 14 mediation, Robbins Geller and Edelson inviting them to participate as equals,
 and despite Robbins Geller and Edelson deferring to their selection of
 mediator and scheduling of mediation;
- 15 3. Refused to take Robbins Geller and Edelson up on their offers to share the
 16 results of their internal investigations, or their discussions and informational
 exchanges with the defendants; and
- 17 4. Failed to otherwise substantively advance the litigation – *e.g.*, by obtaining
 18 relevant information from defendants.

19 Thus, when viewed as a whole, counsel for the *Sterling*, *JGX* and *Estrella* plaintiffs have actually
 20 worked against the efficient advancement of the litigation to the benefit of the Class.⁷

21 Likewise, the *Wood* plaintiffs’ counsel have taken a “more is better” approach to motion
 22 practice thus far, having fully briefed a motion for a preliminary injunction and for expedited

23 ⁷ The *Sterling* plaintiffs understandably choose to focus less on past successes in
 24 privacy/technology class actions and more on which copy-cat filers “support” their proposed
 25 leadership. But Rule 23(g) and cases applying it describe the factors to be considered in appointing
 26 interim class counsel, and claiming popular votes of other lawyers is not one of them. In any event,
 27 each movant, including Robbins Geller and Edelson, certainly have the support of many non-
 28 movants. Given that the *Sterling* group raised the issue, it is worth noting that it double-counts the
 so-called “support” of some attorneys. *See, e.g., Johnson v. Lenovo and Thweatt v. Lenovo* (both
 filed by Federman & Sherwood as counsel for plaintiff; both supporting the *Sterling* group); *Phillips*
v. Lenovo and *Wood v. Lenovo* (N.D. Cal.) (both filed by Weitz & Luxenberg, P.C. as counsel for
 plaintiff; both supporting the *Sterling* group).

1 discovery in the Eastern District of North Carolina despite knowing that it was all-but-certain that
 2 the *Wood* action would be consolidated with the other actions pending against Lenovo and
 3 transferred to the Northern District. Moreover, while the *Wood* plaintiffs repeatedly state in their
 4 motion that Lenovo's delivery of an "Important Security Message" to some users was directly
 5 caused by their preliminary injunction motion, they present no evidence of causation and ignore
 6 wholesale Lenovo's potential pre-existing legal obligation to provide notice and public scrutiny
 7 calling for a response.⁸

8 Finally, counsel in the *Babbitt* matter (Saveri firm) make no effort to argue that they have
 9 performed any beneficial work for the Class since filing. Instead, they simply argue that they bring a
 10 "strategic advantage" to the table, (Dkt. No. 7 at 10), by virtue of their client having agreed to a New
 11 York choice of law clause. *Id.* at 3, 10. However, not only does the Saveri firm offer no basis for its
 12 conclusion that such a clause would apply New York law to all absent class members (indeed, it
 13 acknowledges as much by pleading claims under other states' laws), it also ignores the fact that any
 14 "strategic advantage" offered by the clause could be achieved regardless through the use of separate
 15 state classes and subclasses.

16 Taken as a whole, then, it is apparent that Robbins Geller and Edelson – largely as a result of
 17 their substantial experience in similar cases – have not only created the most value for the Class to
 18 date, but will also operate in the most efficient manner of the proposed lead firms.

24 ⁸ Lenovo explicitly denied any link between the preliminary injunction motion and Lenovo's
 25 security message, and likewise noted that nearly every "admission" touted by the *Wood* plaintiffs
 26 was already publicly available knowledge. *See Wood* Dkt. 16 at 4. That the *Wood* plaintiffs claimed
 27 responsibility for the release of already-available facts may be more indicative of, if anything,
 28 insufficient pre-suit investigation. *See also* Seth Rosenblatt, *Lenovo's Superfish security snafu blows up in its face*, CNet (Feb. 20, 2015), available at <http://www.cnet.com/news/superfish-torments-lenovo-owners-with-more-than-adware/>; Dan Goodin, *Two weeks on, Superfish debacle still causing pain for some Lenovo customers*, CNet (Mar. 6, 2015), available at <http://arstechnica.com/security/2015/03/two-weeks-on-superfish-debacle-still-causing-pain-for-some-lenovo-customers/>.

VI. CONCLUSION

For the foregoing reasons and as explained their opening motion, plaintiffs in the *Pick* and *Hunter* actions respectfully request that the Court appoint their counsel, Robbins Geller Rudman & Dowd LLP and Edelson PC, as interim co-lead class counsel in the Consolidated Actions, and award any such other relief it deems reasonable and just.

DATED: July 7, 2015

Respectfully submitted,

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10 **ATTESTATION OF CONCURRENCE IN FILING**

11 Pursuant to the United States District Court for the Northern District of California's Civil
12 L.R. 5-1(1)(3), Carmen A. Medici attests that concurrence in the filing of this document has been
13 obtained.

14 DATED: July 7, 2015

s/ Carmen A. Medici
CARMEN A. MEDICI

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2015, I authorized the electronic filing of the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I caused to be mailed the foregoing document or paper via the United States Postal Service to the non-CM/ECF participants indicated on the attached Manual Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on July 7, 2015.

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